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PATENT
2569-0103P

IN THE U.S. PATENT AND TRADEMARK OFFICE

In re application of

Before the Board of Appeals

Wells OBRECHT

Appeal No.:

Appl. No.:

08/900,360

Group: 2765

Filed:

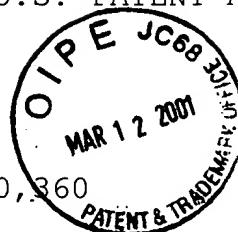
July 25, 1997

Examiner: MEINECKE DIAZ, S.

Conf.:

For:

METHOD AND APPARATUS FOR PROCURING GOODS
IN AN AUTOMATED MANNER



APPEAL BRIEF TRANSMITTAL FORM

Assistant Commissioner for Patents
Washington, D.C. 20231:

March 12, 2001

Sir:

Transmitted herewith is an Appeal Brief (in triplicate) on behalf of the Appellants in connection with the above-identified application.

The enclosed document is being transmitted via the Certificate of Mailing provisions of 37 C.F.R. 1.8.

A Notice of Appeal was filed on January 12, 2001.

Applicant claims small entity status in accordance with 37 C.F.R. § 1.27

The fee has been calculated as shown below:

Extension of time fee pursuant to 37 C.F.R. §§ 1.17 and 1.136(a) -

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A check in the amount of \$155.00 is attached.

Please charge Deposit Account No. 02-2448 in the amount of \$0.00. A triplicate copy of this sheet is attached.

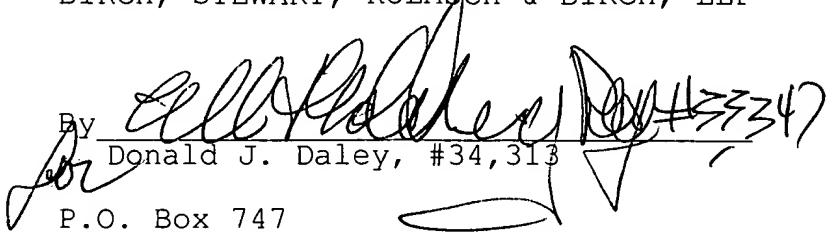
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If necessary, the Commissioner is hereby authorized in this, concurrent, and future replies, to charge payment or credit any overpayment to Deposit Account No. 02-2448 for any additional fees required under 37 C.F.R. §§ 1.16 or 1.17; particularly, extension of time fees.

Respectfully submitted,

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2569-0103P

(Rev. 01/22/01)



PATENT
2569-103P

IN RE APPLICATION OF

Wells OBRECHT

BEFORE THE BOARD OF APPEALS

Appeal No.:

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Filed: July 25, 1997

Examiner: MEINECKE DIAZ, S.

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Appendix of Claims A1-A5
Attachments:

- A- Copy of Page 133, "Basic English Usage"
- B- Copy of Declarations (2) Under 37 C.F.R. § 1.131

PATENT
2569-103P

IN RE APPLICATION OF
APPEALS

Wells OBRECHT

Appl. No.: 08/900,360



BEFORE THE BOARD OF

Appeal No.:

Group: 2765

Filed: July 25, 1997

Examiner: MEINECKE DIAZ, S.

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GOODS IN AN AUTOMATED MANNER

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March 12, 2001

Assistant Commissioner for Patents
Washington, D.C. 20231

Sir:

I. REAL PARTY IN INTEREST

The real party in interest in this application is the inventor, Wells Obrecht, 509 Edgevale Road, Baltimore, Maryland 21210.

II. RELATED APPEALS AND INTERFERENCES

There are no related appeals and interferences regarding the subject matter of the present application.

III. STATUS OF CLAIMS

Claims 1-20 are pending and they have been rejected.

IV. STATUS OF AMENDMENTS

No amendments were filed after final nor was a reply submitted after final.

V. SUMMARY OF THE INVENTION

The present application is directed to a method and apparatus for purchasing goods or services from a seller which includes, for example, a computer and the use of an internet connection. In the method, a request is received from a buyer for goods or services with a plurality of criteria (attributes) relating to the seller, the goods and services. For example, the criteria can be the location of the seller, customer satisfaction of seller (CSI e.g. page 15 of the specification) preferred for purchasing the type of goods or services required. If the criteria is color or more details of the goods they are set forth. For example, if this is an automobile that is requested, the particular features of the automobile desired are set forth. Thereafter, this information is sent to a central computer and the computer based on the criteria selects at least one seller from a predetermined group. Thereafter, the buyer's request is submitted to at least some of the sellers and the sellers within a predetermined time interval responds via the computer. The information sent from the seller is compiled and the sellers are ranked based on the compiled information including the criteria set forth by the buyer. Thereafter, sellers are selected with the relatively highest ranking and

this information is sent to the buyer so that the buyer may choose which seller he prefers based on his criteria.

In the apparatus, there is a computer with an input means for receiving a request for a desired good such as an automobile, for example, from a perspective buyer. The request includes a plurality of predetermined criteria. The central computer is a selecting means for selecting at least two providers (sellers) from a predetermined group of providers. There is an internet connection for transmitting the request of the buyer to the selected provider. The central computer receives responses from the selected provider. There is a computation means including the central computer for compiling information provided in responses received within a predetermined time interval for ranking the providers based upon the compiled information including a plurality of criteria provided by the buyer. Thereafter, there is an output means including an internet connection for providing the compiled responses of the selected providers for access by the prospective buyer.

The apparatus is generally shown in Figure 1 and in Figure 2 there is an overview of the method.

The above summary of the invention has been made to comply with the requirements set forth for filing briefs in the U.S. Patent Office. The statements above are not to be considered as limiting to the claimed invention in the context claimed.

VI. ISSUES

(1) Whether claims 1-20 are obvious under 35 U.S.C. § 103(a) as being unpatentable over the product Source Interactive Software (hereinafter referred to as Source Interactive or Interactive Source, described in references U, V, W, X, U(2), and V(2) in view of Salmon et al. (U.S. Patent No. 5,592,375), as set forth in Sections 3-5 of Paper No. 11. Paper No. 11 is the Office Action mailed February 17, 2000.

(2) Whether the Applicant's Declaration under 37 C.F.R. § 1.131 signed June 6, 2000, which incorporated a previous Declaration signed December 7, 1999, is sufficient to show reduction to practice or conception and diligence for overcoming the reference identified as "X" dated January 10, 1996?

VII. CLARIFICATION OF REFERENCES RELIED ON

In an Office Action dated February 17, 2000 in the rejection references U, V, W, X, U2, and V2 were relied on as the base reference. In a telephone interview with the Supervisor, on May 25, 2000, the Supervisor, after an inquiry by the undersigned, stated that "the body of the rejection only recites references U, V, X, and Salmon." This statement was faxed to the undersigned and is part if the Official File Wrapper.

In the Final Office Action, the Patent Office has again set forth that the references applied were the same references set forth in the Office Action dated February 17, 2000. This appears to contradict the

statement of the Supervisor. While this is an inter-Patent Office matter, it is requested that the Patent Office clarify their position to make the record clear.

VIII. DATE WISE - NON-COMPETENCY OF REFERENCES

The present application has an effective filing date based on a provisional application. This effective filing date is July 25, 1996.

In the rejection, as a reference, the print out IBNL Restructures Capitalization; Adds Proven Management; releases its new "Virtual Source Software" was used. This document, which is identified as U(2), is dated **November 12, 1996**. The date of this document is after the effective filing date of the present application and accordingly cannot be used properly as a reference under U.S. Patent Law.

With respect to the V(2) reference, which for the purposes of identification will be identified as V Source (the V Source Story), is not dated. But it appears that the date of this reference was published after **November 9, 1999** because on the last page of that document the Procurement Show in Phoenix of November 7-9, 1999 is referred to. Certainly, as this show was referred to, the document must have a date after November 9, 1999 because it cannot be said to predict future occurrences. Thus, because of the date of the V(2) document it is not a competent reference under 35 U.S.C. § 102 as the effective filing date of the present application is **July 25, 1996**.

IX. DESCRIPTION OF REFERENCES

Initially, the base reference referred to represents a plurality of publications and will be identified as they were in the Patent Office by the alphabet description.

Alphabet Description:

U

Article:

Interactive Buyers Net: Buyer/Seller Interactive Software, Inc. acquired new software introduced.

Date of Article:

August 22, 1995

While this article was referred to in the Office Action as indicating that it was describing the structure in reference X, there is nothing in the reference that identifies the assertion made in the Office Action.

Alphabet Description:

V

Article:

IBNL announces signing of more than 8 billion in buying power.

Date of Article:

November 15, 1995

This reference does disclose as set forth in the rejection that "source interactive software is a PC based system utilizing a propriety language to create an effective on-line interface for buyers (public and

private sector) and sellers. The software allows a buyer to transmit bid packages with attached files that can include such things as product specifications, graphic drawings, new vendor qualification forms, and any special requirement instructions. This reference was also referred to in the Final Office Action as describing the subject matter in reference X as an earlier date. This latter assertion is not found in this reference.

Alphabet Description:

W

Article:

IBNL declares 20 percent stock dividend; Source Interactive Software systems operational.

Date of Article:

December 14, 1995

This document describes, for example, some matters regarding interactive software and dividends and common share replacements. While the Final Office Action asserts that this article establishes that the description in Reference X was known before the Reference X, this is not found or suggested in the article.

Alphabet Description:

X

Article:

IBNL forges into the future of buying and selling with source interactive software.

Date of Article:

January 10, 1996

In paragraphs 5, 6, 7 and 8, this article refers to buyers and sellers modem information to IBNL central system. It describes that a buyer fills out on-screen source template that describes his or her procurement needs, including categories, quantities, time limitations, and other pertinent data. The bid requests may also include attachments such as computer drawings, filings, pictures, schematics, e-mail, and other product specifications. The sellers identify their products and services on a source template and can see potential customers on demand when a buyer sends out a request that matches a selected category. In an initial setup, sellers identify their products and services on a source enrollment template and can connect with potential customers on demand when a buyer sends out a request that matches any categories they have enrolled under. The sellers are connected to the request of all on-line buyers. In paragraph 8, the sellers initially identify their products.

Alphabet Description:

U(2)

Article:

IBNL restructures capitalization; adds proven management; releases its new "virtual source" software.

Date of Article:

November 12, 1996

As explained, supra, this document does not have an effective date before the effective date of the present application and, thus, is not qualified as a competent reference under 35 U.S.C. § 102.

Alphabet Description:

V(2)

Article:

The V source story.

Date of Article:

Undated

As explained, supra, this document was published after November 9, 1999 and is not a competent reference under 35 U.S.C. § 102.

Salmon et al., U.S. Patent No. 5,592,375 (hereinafter "Salmon") issued January 7, 1997 with a filing date of March 11, 1994.

The Salmon patent allows a seller to submit to a data base data relating to services or products for sale. This data can be reviewed by a buyer with the assistance of an interactive expert system (see column 1, lines 20-25). In Salmon, the buyer can list the wants or must wants that he requires. Based on what was previously inputted by the seller into the system in storage, the buyer can select, based on criteria, the item. The items can be ranked based on the previous entry by the buyer.

Salomon relates to a static type device and there is no response by a seller to the criteria set forth by the buyer.

X. GROUPING OF CLAIMS

Claim 1 is separately grouped and stands or falls alone.

Claim 2 is separately grouped and stands or falls alone.

Claim 3 is separately grouped and stands or falls alone.

Claim 4 is separately grouped and stands or falls alone.

Claim 5 is separately grouped and stands or falls alone.

Claim 6 is separately grouped and stands or falls alone.

Claims 7, 8, and 9 are grouped together and stand or fall together.

Claims 10-18 are grouped together and stand or fall together.

Claim 19 and 20 are grouped together and stand or fall together.

XI. ARGUMENTS

(1) The argument with respect to the rejection under 35 U.S.C. § 103 is set forth below.

Claims 1-19 and, apparently, 20 were rejected under 35 U.S.C. § 103(a) as being unpatentable over the product Source Interactive Software (hereinafter “Source Interactive”) described in the references U, V, W, X, U(2), and V(2) in view of Salmon. This rejection is traversed.

Initially, with respect to the reference U(2) and V(2), these are not competent references because of their date as explained above. Accordingly, no further comments are necessary as to these documents.

In the rejection, reference "X" (titled: IBNL Forges . . . Software, January 10, 1996) (hereinafter "X") in paragraph 8 it was asserted that the step in claim 1 receiving - . . . responses from at least one seller to the request is found in that paragraph. Paragraph 8 of reference "X" states as follows:

In an initial step, Sellers identify their products and services on a source enrollment template and can connect with potential customers on demand when a buyer sends out a request that matches any category they have enrolled under. Sellers are connected to the request of all on-line buyers.

The quotation from reference "X", paragraph 8, does not at all meet the steps in, for example, claim 1 (c) and (d). In the "X" reference, the sellers first identify their products and when a buyer sends out a request that matches the category, sellers are connected to the request of the buyers. This is completely different than the method steps set forth, for example, in base claim 1. Apparently, "X" is describing a "static system" as explained in the first full paragraph on pages 2 and 3 of the specification.

Additionally, at least recognizing that the primary reference cited does not show or suggest all steps and apparatus as claimed, the Patent Office then relies on Salmon to show, for example, "the ranking step of claim 1".

This step in the context claimed provides a ranking of the sellers.
The Patent Office asserts that Salmon teaches such a ranking. This is

traversed. What Salmon is doing is ranking the product itself such as real estate, automobiles, aircrafts, or yachts, etc. (see, for example, column 2, lines 18 and 19). This is quite different than what has been claimed in the method and article.

In the present application, in the context claimed, it is the sellers who are ranked based on criteria set forth by the buyers. The products are not ranked. Also, there is no selecting "in the references applied". In evaluating the wording of the claims, the Patent Office is again directed to the case of Multiform Dessicant, Inc. v. Medzam, 45 USPQ2d 1429, 1432 (Fed. Cir. 1998) (see MPEP § 2106). Also, in evaluating terms in the claim, reference is also made to the guidelines set forth in MPEP § 2106 (see, Markman v. Westview Instruments, 38 USPQ2 1461 (1996)), which section of the MPEP states as follows:

Office personnel must rely on the Applicants disclosure to properly determine the meaning of terms used in the claims.

While the Patent Office asserts that it would be obvious to combine the teachings of the references, there is no *prima facie* case of obviousness present at least for the two points as follows:

- (1) the structure claimed and steps are not shown or suggested in the combination of the references; or
- (2) outside of the Applicants own disclosure there would be no motivation to combine the references.

Point (1) has been discussed above. With respect to the motivation (point 2), it is not understood from the Office Action what Salmon would suggest to one skilled in the art in modifying the primary references V, X, or U. Again, it appears that the Patent Office only has concentrated on the obviousness of structure or steps which really have not been shown "instead of the context of the claims regarding the subject matter as a whole". See the recent case of In re Dembiczak 50 USPQ2d 1614 (Fed. Cir. 1999).

In Salmon, while the Final Office Action, which incorporated the rejection, stated that the steps (e)-(g) were found in Salmon, this is traversed. In Salmon, there is no compiling information in the responses received from at least one seller to the request because in Salmon the data from the seller is already within the data base and there is no request submitted based on criteria to various sellers so that the sellers can be ranked. Also, in step (f), there is no ranking of sellers based upon the compiled information and selecting the sellers relative to the highest ranking. Only the products or services have been ranked in Salmon. Also, step (g), is "providing the compiled responses of the selected sellers for access by the buyer". This is not shown or suggested by Salmon. In Salmon, there is no response by the selected sellers based on the criteria submitted by the buyers. In Salmon, again as stressed above, the information of the product has already been inserted into the data base for the buyers make their request based on their criteria. Actually,

Salmon relates more to a static system, which was discussed as conventional in the specification. See, for example, the last paragraph on page 2 of the specification and the first paragraph on page 3 of the specification. Thus, the combination of both references does not establish a *prima facie* of obviousness. Even combining the suggestions in the references applied, the steps and structure that has been claimed is not shown or suggested.

In the Office Action, with respect to claim 2, “a computer receives the request” (reference X, paragraph 5 and reference V, paragraph 4) were relied on. While there is no doubt that a computer is set forth in reference X it is the context of the claims which has been shown not to be obvious. The Applicants are not just relying on a computer. The Applicants are relying on the totality of what has been claimed.

With respect to claim 3 “selecting is performed by a central computer” (reference X, paragraph 5 was relied on). While paragraph 5 may suggest a computer, it does not suggest a central computer in the context claimed.

With respect to claim 4, it was asserted that reference V, paragraph 6 shows transmitting by an internet system. Even assuming that reference V, paragraph 6, shows an internet system, this is just part of the method and the structure steps in the context claimed is not shown or suggested.

With respect to claim 5, the rejection relies on reference X, paragraph 5.

It is submitted that this is not shown in reference X, paragraph 5 in the context claimed.

With respect to claim 6, as explained above, Salmon does not show this feature and the statements in the rejection regarding obviousness are only based on conjecture. No evidence has been provided.

With respect to claim 7, the rejection relies on reference V, paragraph 6, but this paragraph has nothing to do with accessing by the buyer because as stated in paragraph 6 of V:

The cost for unlimited system access and interactive use of source is \$360.00 annually, \$30.00 monthly (plus applicable sales taxes) and any cost related to modem or internet digital transmissions.

With respect to claims 8 and 9, it was stated that reference U, paragraph 2 and reference X, paragraph 1. These claims are considered patentable at least for the same reasons as their base or intervening claims.

Regarding claims 10-18, these claims recite a system which is related to the method, but the Office Action does not give any reasons merely saying that the subject matter claimed is obvious over the method. These claims set forth specific structure and their relationship which provides for the improved device. The rejection is really based on conjecture.

With respect to claim 19, this claim was rejected based on reference U, paragraph 1, reference V, paragraph 4, reference X, paragraph 6, and reference X, paragraph 5. Here, again, the Patent Office is merely relying on bits and pieces of the references without concentrating on the subject matter as a whole as required under 35 U.S.C. § 103. The rejection does assert a difference in the claims from these references and relies on Salmon. But, again, the rejection as relied on states bits and pieces of the reference without considering the subject matter as a whole, as required by 35 U.S.C. § 103. Even combining the art applied there is no suggestion of a system to perform that function in the context claimed.

With respect to claim 20, U.S. Patent No. 4,789,928 was relied on. This reference has not been applied in the heading of the claim and, thus, is not a viable reference as set forth in the case of In re Hoch, 166 USPQ 406 (CCPA 1970) cited in MPEP § 706.02(j).

Certainly, the Applicant is not asserting that previously owned automobiles were not previously sold, but claim 20 depends from claim 19 and as claim 19 relates to a system that is patentable for the reasons advanced above, the subject matter of claim 20 would also not be obvious.

In the Final Office Action, in Section 2, it was asserted that the several articles to describe the product that the Examiner asserted that the product disclosed in detail in the X reference is the same product

which is addressed as early in the U reference. This is unsupported conjecture. The same comment applies to the V reference and the W reference. These added documents do not suffice as evidence that reference X dated back to at least December 14, 1995 as asserted in the rejection.

Also, in Section 3 of the Final Office Action, it was asserted in the last sentence of the second paragraph that "no obligation to cite each and every supporting reference in the body of the rejection since all references collectively contribute to the description of the product Source Interactive Software." This statement is completely contrary to the law which by mandate the Patent Office must follow. When a reference is cited it must be explained.

See In re Rijckaert, 28 USPQ2d 1955 (Fed. Cir. 1993) wherein the court stated as follows:

When the PTO asserts that there is an explicit or implicit teaching or suggestion in the prior art it must indicate where such a teaching or suggestion appears in the reference. (emphasis added)

Note the Rijckaert case is cited in MPEP § 2112.

Also, on page 5, the Patent Office asserts that steps A, B, C, for example, in the method need not be the first, second, and third steps. Actually, a, b, c are synonymous with first, second, and third steps. The rearrangement of the steps in the claims would make no sense when the claim is read as a whole. For example, how could any of the steps a, b,

or c be arranged in view of what these steps describe? Thus, what basis the Patent Office is using for this type of assertion is not clear.

Also, on page 5(c), the assertion was made that ranking the sellers was the same thing as ranking the products.

It was also asserted that presumably product information must come from each respective seller in the Salmon patent; therefore, by ranking products, the sellers are inherency ranked as well. As well known, inherency cannot be used in a § 103 rejection. In any case, it appears that the Examiner is asserting that this is implicit from the references. This is unsupported conjecture. Also, the ranking, as defined cannot be "read on" the references. See, for example, the explanation of ranking as set forth in the Specification and, for example, Figures 11 and 12 of the present specification, and as explained above. Also, the assertion in the Office Action that Salmon anticipates steps e)-g) of claim 1 is not understood. No § 102 rejection has been made. Also, the term ranking as used in the claims on its face would be clear to one skilled in the art. As recognized in the Office Action, the ranking is further described on page 21, second full paragraph. With regards to the term selecting, even by common dictionary definition, this would be understood by one skilled in the art. Furthermore, as set forth in the specification, ranking and selecting have been explained. See, for example, page 4 of the specification, first full paragraph, second full paragraph, and third full paragraph.

Even without the full definition of these terms in the specification, one skilled in the art would understand selecting from a ranking. See, for example, the dictionary definition¹ wherein ranking is defined as the act of listing persons or things in order of importance, achievement, quality, etc. such as a listing and selecting is defined as selection being selecting a person or thing chosen. An example of ranking and selecting, although not related to the present application is, for example, the ranking of college football teams based on criteria such as their records, scoring ability, etc. and selecting the top two ranked teams for a playoff in a bowl game.

(2) For the reasons advanced above, it is considered that the rejection under 35 U.S.C. § 103 fails as a *prima facie* case of obviousness. Additionally, the Applicant has presented evidence regarding reduction to practice or conception and diligence to overcome the effective date of the X reference which is January 10, 1996. In a Declaration under 37 C.F.R. § 1.131, signed December 7, 1999, the inventor clearly established that conception and reduction to practice of the invention was done before February 22, 1996, which was the effective date of an applied reference, U.S. Patent 5,758,328. The Patent Office correctly recognized this and withdrew the rejection based on U.S. Patent No. 5,758,328.

¹ Webster's New World Dictionary, 3rd College Edition, 1991.

After that withdrawal of the rejection, the Patent Office relied on a reference identified as X which has an effective date of January 10, 1996, which is approximately six weeks before the reference overcome by the first Declaration. In an effort to overcome the date of the reference X, a Supplemental Declaration was provided. This Supplemental Declaration, which was signed on June 6, 2000, indicated by evidence either reduction of practice or conception with diligence to overcome the date of the X reference which was January 10, 1996. That is, in the Supplemental Declaration it was factual stated that the inventor left full-time employment on or before January 10, 1996 to work on the invention in the context claimed.

What the Supplemental Declaration shows is that on or before January 10, 1996, the conception of the invention was made and that there was diligence until reduction to practice which was indicated in the Declaration filed previously on December 7, 1999. The original Declaration and the Supplemental Declaration are attached to this Brief.

In answer to the Applicants Declaration, the Patent Office has asserted that the Declaration is vague because the term "from the date of January 10, 1996" technically it does not say whether the inventor worked on the drafts three weeks before or after January 10, 1999[sic 1996]. The phrase "from January 10th" by dictionary definition² defines "from" as a beginning.

² Webster's New Dictionary, 3rd College Edition, page 542, 1991.

Also, in a basic English usage book³, at page 133, is graphically illustrated that the word “from” defines forwards in time and not backwards in time. For the convenience of review, a copy of page 133 of that book is highlighted and attached to this Brief.

Also, the Examiner asserts that “other references” establish a date before the X reference. As set forth above, this position was traversed.

Also, the Office Action asserts that as the X reference refers to a large pool of participants by the time said reference was published. Consequently, the inventor needs to be swear behind the Source Interactive Software as a whole, taking into account its earlier date of disclosure in order to provide an effective Declaration under 37 C.F.R. § 1.131. **What exact date is the Patent Office Relying on?** The position of the Patent Office is that, otherwise, there would not likely be such a large pool of participants by the time said reference was published. But, once the rejection is removed based on the reference, no further evidence of the reference can be relied on. Furthermore, the assertion of a large pool of participants is merely conjecture and is not competent evidence. It could very well be that the X reference was used for “sales or stock puffing.” But, again, once a reference is overcome by a Declaration under 37 C.F.R. § 1.131, referral to this reference cannot be used as it is no longer a viable competent reference under the law.

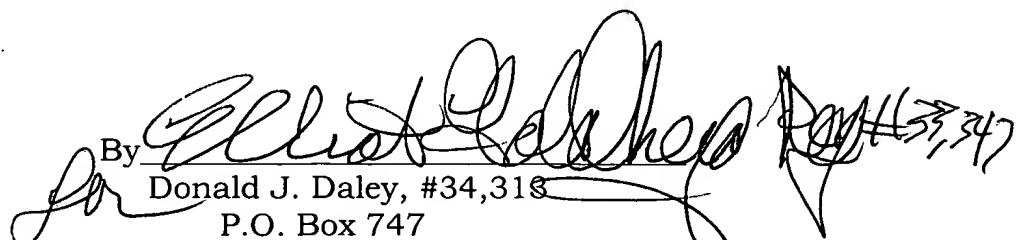
³ Swan, Basic English Usage, Oxford Press, 1994.

XII. CONCLUSION

For the reasons specifically set forth above, the rejections and objections raised in the Office Action should be reversed.

Respectfully submitted,

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